

**United States Department of Labor
Employees' Compensation Appeals Board**

G.J., Appellant

and

**DEPARTMENT OF DEFENSE, DEFENSE
LOGISTICS AGENCY, Seaside, CA, Employer**

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**Docket No. 19-0801
Issued: September 16, 2019**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On March 1, 2019 appellant filed a timely appeal from a January 14, 2019 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant has met his burden of proof to establish an emotional condition in the performance of duty.

FACTUAL HISTORY

On August 29, 2018 appellant, then a 53-year-old information technology (IT) specialist, filed a traumatic injury claim (Form CA-1) alleging that on August 23, 2018 he sustained "unbearable and life-threatening" emotional distress due to a hostile work environment, with

¹ 5 U.S.C. § 8101 *et seq.*

professional embarrassment and fear of reprisals, and retaliation by upper management. He described the nature of his claimed injury as extreme headaches, dizziness, mental fog, nausea, sleep deprivation, lack of concentration, and overall extreme fatigue. On the reverse side of the claim form the employing establishment controverted the claim on causation.

In support of his claim, appellant submitted a witness statement dated August 26, 2018 from L.H., a student trainee. L.H. noted that he personally witnessed appellant's immediate emotional distress caused by a hostile work environment/event. He related that a senior organizational management team member displayed serious offensive conduct during a formal meeting. This team member berated and belittled appellant in front of him, his immediate supervisor, and others participating in the meeting, with the apparent intent to personally and professionally embarrass him. L.H. instantaneously witnessed the stress appellant experienced due to this hostile incident. He indicated that appellant continued to experience this same emotional distress, which was visibly clear in his demeanor.

In a development letter dated September 5, 2018, OWCP informed appellant of the deficiencies of his claim. It advised him of the type of factual and medical evidence needed to establish his claim and provided a questionnaire for his completion. Appellant was afforded 30 days to respond.

OWCP subsequently received medical evidence addressing appellant's diagnosed emotional conditions and resultant disability and a September 5, 2018 response to the development questionnaire. Appellant indicated that his claimed injury occurred around 1:25 p.m. on August 23, 2018 while he was in the performance of his official duties as a senior IT specialist. He further indicated that he was invited to attend an official teleconference meeting coordinated by the Enterprise Services Directorate (ESD) Information Technology Governance (ITG) Division Director to provide a project status update. Appellant related that his professional role during the teleconference was Lead ESD Point of Contact (POC) for a very high profile project. He noted that his Form CA-1, witness statements, and an accompanying grievance memorandum dated August 26, 2018 described how his claimed traumatic injury occurred. Appellant listed the physicians who had treated him. He maintained that the immediate effects of his claimed work-related injury included a complete mental breakdown that directly resulted from abusive senior management behavior through the use of intimidation, public bullying, professional belittlement, and extreme humiliation. Appellant described additional symptoms he experienced after the August 23, 2018 incident, including a profound fear of more abusive behavior, intimidation tactics, and "sneaky staged setups" in an effort to render him professionally incompetent.

In the August 26, 2018 memorandum, appellant noted that, during the August 23, 2018 teleconference, J.W., his supervisor, invited J.M., an ESD deputy director, to address the group. He contended that J.M. spoke directly to him in a very rude, condescending, and unprofessional tone and he also berated, belittled, intimidated, and thoroughly embarrassed him. Appellant considered J.M.'s conduct offensive and unfounded as there was no context or reason for the attack. He further contended that J.M. deliberately disrespected him in front of other employees, including a student trainee he had been professionally mentoring. Appellant maintained that J.M. deliberately chose to make him the center of attention and proceeded to bully him in front of the meeting attendees. He asserted that J.M. asked him, "you do know you are the Directorate Lead? You probably don't even know what that means! Do I need to explain it to you?" Appellant

claims he immediately felt demoralized in front of his team members and paralyzed by a state of shock. He claimed that, after this hostile incident, a team member said to him, “he just roasted you in front of the group; what the f**k is wrong with him? [J.W.] just set you up.” Appellant further claimed that even his mentee realized that he was inappropriately disrespected and bullied by the highest levels of management from their directorate. He felt that J.W. had staged the entire event to have him attacked and belittled by her longtime friend, J.M., in front of the entire group. Appellant also felt exposed and vulnerable by the collusive nature of these managers in manipulating the events of the meeting. He requested that a formal grievance be initiated to remove J.M. and J.W. from federal service.

Appellant submitted an additional witness statements dated August 24, 2018 from L.H. and August 29, 2018 from B.T., a supervisory enterprise architect at the employing establishment, indicating that on August 23, 2018 they witnessed J.M. verbally attack appellant in an extremely unprofessional and disrespectful manner in front of ESD employees during a teleconference meeting. L.H. noted that J.M. berated appellant for not “ccing” him on his response to an email from J.M. He noted that everyone was still on the line and in the room. L.H. related that he never believed the warnings he had been given to be careful about what he stated and how it was stated because J.M. may be listening on the line. B.T. indicated that J.M. put down appellant with a very loud, snarky, and degrading speech pattern when he told appellant that, “you know you’re the lead, do you even know what that means!” He then described appellant’s emotional reaction to this incident.

Appellant also submitted medical evidence addressing his diagnosed emotional conditions, causal relationship, disability, and work capacity.

In a letter dated October 9, 2018, T.H., an injury compensation specialist at the employing establishment, contended that appellant’s claim should be treated as an occupational disease claim based on a physician’s note dated September 12, 2018, which indicated that he complained of stress at work that had been accumulating over the past two years.

OWCP, by development letter dated October 11, 2018, requested that the employing establishment respond to appellant’s allegations and provide his work duties and accommodations it made to reduce his stress.

OWCP continued to receive medical evidence relative to appellant’s diagnosed emotional conditions, causal relationship, and work capacity.

In a letter dated October 16, 2018, B.T. responded to OWCP’s October 11, 2018 development letter. He deferred to appellant to determine what aspects of his job were stressful. B.T. related that no official accommodations were made through the organization’s accommodation office for appellant. He further related that no staffing shortages affected his workload or placed extra demands on him during the period he claimed detrimental work factors existed. B.T. indicated that, after the alleged incident, appellant was unable to perform his duties. Appellant remained on leave under the oversight of medical professionals. B.T. indicated that

appellant had no record of performance or conduct problems. He submitted duplicate copies of his August 29, 2018 witness statement and L.H.'s August 24, 2018 witness statement.²

In a letter dated October 29, 2018, T.H. also responded to OWCP's development letter. She cited Board precedent and contended that appellant's self-generated response to the manner in which his supervisor exercised his supervisory discretion fell outside the scope of coverage provided by FECA. T.H. reiterated her prior contention regarding the nature of appellant's claim.

OWCP, by letter dated December 11, 2018, requested additional information from the employing establishment regarding the alleged August 23, 2018 incident.

In a response letter dated January 9, 2019, T.H. noted that there had been no finding of error or abuse by the employing establishment regarding the August 23, 2018 incident. She further noted that counsel for the employing establishment did not warn or reprimand the deputy director with regard to this incident. T.H. indicated that no Equal Employment Opportunity (EEO) complaint was filed regarding the claimed incident, but a grievance had been filed. An investigation determined that the grievance was unfounded.

By decision dated January 14, 2019, OWCP denied appellant's claim finding that he had not met his burden of proof to establish a compensable factor of employment.

LEGAL PRECEDENT

An employee seeking benefits under FECA³ has the burden of proof to establish the essential elements of his or her claim, including the fact that the individual is an employee of the United States within the meaning of FECA, that the claim was filed within the applicable time limitation, that an injury was sustained while in the performance of duty as alleged, and that any disability or specific condition for which compensation is claimed is causally related to the employment injury.⁴ These are the essential elements of each and every compensation claim regardless of whether the claim is predicated on a traumatic injury or an occupational disease.⁵

To establish an emotional condition in the performance of duty, a claimant must submit: (1) factual evidence identifying an employment factor or incident alleged to have caused or contributed to his or her claimed emotional condition; (2) medical evidence establishing that he or she has a diagnosed emotional or psychiatric disorder; and (3) rationalized medical opinion

² B.T. related that a copy of appellant's official position description accompanied his October 16, 2018 response letter. However, no copy of appellant's position description is found in the record of the case.

³ 5 U.S.C. § 8101 *et seq.*

⁴ A.J., Docket No. 18-1116 (issued January 23, 2019); *Gary J. Watling*, 52 ECAB 278 (2001).

⁵ 20 C.F.R. § 10.115(e); *M.K.*, Docket No. 18-1623 (issued April 10, 2019); *see T.O.*, Docket No. 18-1012 (issued October 29, 2018); *see Michael E. Smith*, 50 ECAB 313 (1999).

evidence establishing that the accepted compensable employment factors are causally related to the diagnosed emotional condition.⁶

Workers' compensation law does not apply to each and every injury or illness that is somehow related to an employee's employment.⁷ There are situations where an injury or an illness has some connection with the employment, but nevertheless does not come within the concept or coverage of workers' compensation. Where the disability results from an employee's emotional reaction to his or her regular or specially assigned duties or to a requirement imposed by the employment, the disability comes within the coverage of FECA.⁸ On the other hand, the disability is not covered when it results from such factors as an employee's fear of a reduction-in-force or his or her frustration from not being permitted to work in a particular environment or to hold a particular position.⁹

Administrative and personnel matters, although generally related to the employee's employment, are administrative functions of the employer rather than the regular or specially assigned work duties of the employee and are not covered under FECA.¹⁰ However, the Board has held that where the evidence establishes error or abuse on the part of the employing establishment in what would otherwise be an administrative matter, coverage will be afforded.¹¹ In determining whether the employing establishment has erred or acted abusively, the Board will examine the factual evidence of record to determine whether the employing establishment acted reasonably.¹²

For harassment or discrimination to give rise to a compensable disability under FECA, there must be probative and reliable evidence that harassment or discrimination did in fact occur.¹³ Mere perceptions of harassment, retaliation, or discrimination are not compensable under FECA.¹⁴

In cases involving emotional conditions, the Board has held that, when working conditions are alleged as factors in causing a condition or disability, OWCP, as part of its adjudicatory function, must make findings of fact regarding which working conditions are deemed compensable factors of employment and are to be considered by a physician when providing an opinion on

⁶ See *S.K.*, Docket No. 18-1648 (issued March 14, 2019); *M.C.*, Docket No. 14-1456 (issued December 24, 2014); *Debbie J. Hobbs*, 43 ECAB 135 (1991); *Donna Faye Cardwell*, 41 ECAB 730 (1990).

⁷ *T.G.*, Docket No. 19-0071 (issued May 28, 2019); *L.D.*, 58 ECAB 344 (2007); *Robert Breeden*, 57 ECAB 622 (2006).

⁸ *L.H.*, Docket No. 18-1217 (issued May 3, 2019); *Trudy A. Scott*, 52 ECAB 309 (2001); *Lillian Cutler*, 28 ECAB 125 (1976).

⁹ *A.E.*, Docket No. 18-1587 (issued March 13, 2019); *Gregorio E. Conde*, 52 ECAB 410 (2001).

¹⁰ See *G.R.*, Docket No. 18-0893 (issued November 21, 2018); *Andrew J. Sheppard*, 53 ECAB 170-71 (2001), 52 ECAB 421 (2001); *Thomas D. McEuen*, 41 ECAB 387 (1990); *reaff'd on recon.*, 42 ECAB 556 (1991).

¹¹ See *O.G.*, Docket No. 18-0359 (issued August 7, 2019); *D.R.*, Docket No. 16-0605 (issued October 17, 2016); *William H. Fortner*, 49 ECAB 324 (1998).

¹² *B.S.*, Docket No. 19-0378 (issued July 10, 2019); *Ruth S. Johnson*, 46 ECAB 237 (1994).

¹³ *S.B.*, *supra* note 3; *Marlon Vera*, 54 ECAB 834 (2003).

¹⁴ *S.B.*, *id.*; *Kim Nguyen*, 53 ECAB 127 (2001).

causal relationship and which working conditions are not deemed compensable factors of employment and may not be considered.¹⁵ If an employee does implicate a factor of employment, OWCP should then determine whether the evidence of record substantiates that factor. As a rule, allegations alone by a claimant are insufficient to establish a factual basis for an emotional condition claim. The claim must be supported by probative evidence.¹⁶ If a compensable factor of employment is substantiated, OWCP must base its decision on an analysis of the medical evidence which has been submitted.¹⁷

ANALYSIS

The Board finds that appellant has not met his burden of proof to establish an emotional condition in the performance of duty.

Appellant alleged that he experienced headaches, dizziness, mental fog, nausea, sleep deprivation, lack of concentration, and overall extreme fatigue due to the actions of J.M. and J.W. on August 23, 2018. The Board notes that appellant does not attribute his claimed emotional condition to his regular or specially assigned duties as an IT specialist under *Cutler*.¹⁸ Rather, appellant has alleged verbal abuse and harassment by management and error and abuse in an administrative matter.

OWCP accepted that, during a teleconference meeting on August 23, 2018, J.M. questioned appellant about his knowledge of his own position title, but found that this incident was not a compensable factor of appellant's federal employment.

Appellant primarily attributed his emotional condition to being asked questions by J.M. in a very rude, condescending, and unprofessional tone concerning his knowledge of his position title, and belittled, intimidated, embarrassed, and deliberately disrespected him in the presence of his coworkers, during a teleconference meeting on August 23, 2018, which created a hostile work environment. He also claimed that J.W. had staged this event to provide the director, J.M., her longtime friend, an opportunity to attack and belittle him in front of the entire group. Appellant maintained that he was demoralized and paralyzed in a state of shock by J.M.'s conduct. He also felt exposed and vulnerable by his managers' collusive nature in manipulating the events of the meeting. Appellant feared more abusive behavior, intimidation tactics, sneaky staged setups, reprisals, and retaliation by management to deem him professionally incompetent. He related that a team member commented to him that J.M. had roasted him in front of the group. The team member also questioned the J.M.'s behavior and alleged that Supervisor J.W. had set-up appellant. Appellant noted that his mentee, L.H., also realized that he had been inappropriately disrespected and bullied by a high-level management official.

¹⁵ *Dennis J. Balogh*, 52 ECAB 232 (2001).

¹⁶ *Charles E. McAndrews*, 55 ECAB 711 (2004).

¹⁷ *Norma L. Blank*, 43 ECAB 384, 389-90 (1992).

¹⁸ *See supra* note 8.

The Board finds that appellant has not established his allegation that J.M. verbally abused or harassed him on August 23, 2018. While appellant submitted witness statements from L.H. and B.T., the Board finds that, despite appellant's arguments that J.M. verbally attacked him, there was no evidence that his comments or questions were unwarranted or constituted verbal abuse.¹⁹ Moreover, L.H.'s statement that he did not believe the warnings he had received to be careful about what he said and how he said it because Deputy Director J.M. may be listening on the line, does not relate to the issue whether Deputy Director J.M. verbally abused or harassed appellant. Additionally, while appellant noted that a team member acknowledged to him that J.M. had mistreated appellant in the presence of their group on August 23, 2018 and that J.W. had set appellant up, he did not submit a witness statement from the team member to corroborate his allegation of verbal abuse and collusion.²⁰ For the foregoing reasons, the Board finds that appellant has not met his burden of proof to establish a factual basis for his claim of verbal abuse harassment on August 23, 2018 by probative and reliable evidence.

Appellant's filing of a grievance, regarding the actions of J.M. and J.W., is an administrative matter and not compensable absent a showing of error or abuse on the part of the employing establishment.²¹ T.H., an employing establishment injury compensation specialist, noted that an investigation conducted by the employing establishment determined that the grievance was unfounded. She explained that there was no finding of error or abuse by the employing establishment regarding the August 23, 2018 incident. In addition, T.H. explained that J.W. was neither warned nor reprimanded with regard to this incident. Based on her statements, the Board finds that appellant has failed to establish a compensable employment factor with regard to the above-noted administrative matter.

The Board, therefore, finds that appellant has not met his burden of proof to establish a compensable employment factor under FECA and, therefore, has not met his burden of proof to establish that he sustained an emotional or stress-related condition in the performance of duty.²² As appellant has not established a compensable employment factor, the Board need not consider the medical evidence of record.²³

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

¹⁹ *E.S.*, Docket No. 18-1493 (issued March 6, 2019).

²⁰ *Supra* note 13. *See also L.H.*, Docket No. 17-1295 (issued November 22, 2017); *Joel Parker, Sr.*, 43 ECAB 220 (1991) (the Board held that a claimant must substantiate allegations of harassment or discrimination with probative and reliable evidence).

²¹ *J.E.*, Docket No. 17-1799 (issued March 7, 2018); *Michael A. Salvato*, 53 ECAB 666, 668 (2002).

²² *E.M.*, Docket No. 19-0156 (issued May 23, 2019); *F.C.*, Docket No. 18-0625 (issued November 15, 2018).

²³ *Y.B.*, *supra* note 8; *Garry M. Carlo*, 47 ECAB 299, 305 (1996).

CONCLUSION

The Board finds that appellant has not met his burden of proof to establish an emotional condition in the performance of duty.

ORDER

IT IS HEREBY ORDERED THAT the January 14, 2019 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 16, 2019
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board